



Irish Communication Review

Volume 5 | Issue 1

Article 6

January 1995

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Sean Dooney

Institute of Public Administration

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Recommended Citation

Dooney, Sean (1995) "Some Thoughts on Freedom of Information and the Civil Service," *Irish Communication Review*. Vol. 5: Iss. 1, Article 6.

doi:10.21427/D7XB01

Available at: <https://arrow.tudublin.ie/icr/vol5/iss1/6>

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Some thoughts on freedom of information and the civil service

Sean Dooney

Sean Dooney was an Assistant Secretary in the Department of Agriculture and Food. He is author of the *Irish Civil Service* and co-author with John O'Toole of *Irish Government Today*. He is a senior lecturer at the Institute of Public Administration.

All new civil servants receive from the personnel unit of their department a number of circulars dealing with various aspects of their conditions of employment. One of these circulars, the receipt of which they are obliged to acknowledge, deals with official secrecy. The circular draws attention to the obligations of civil servants in relation to secrecy in the transaction of official business, which obligations are provided for in Section 4 of the Official Secrets Act 1963. That section, as readers are no doubt aware, provides that they shall not communicate any official information to any other person unless they are duly authorized to do so or do so in the course of, and accordance with, their duties as the holder of a public office; or when it is their duty in the interest of the state to communicate it. Reasonable care must be taken to avoid any unlawful communication of such information. Any doubt which may arise as to whether a person is authorized to communicate information in the course of and in accordance with their duties should be referred through the appropriate official channels (through their superiors) to the head of their department for determination.

The circular goes on to remind civil servants that it is their duty not to make unauthorized communications, directly or indirectly, about matters which come to their knowledge in the course of their official duties and to refrain from mentioning such matters to anyone other than in the course of such duties. Particular care should be taken to avoid releasing official information in the course of informal or unguarded conversations. This instruction applies to decisions already taken as well as to matters which may still be under consideration or discussion.

It further says that civil servants may not, without the prior permission of the head of their department use any material drawn from sources to which they have had access in their official capacity or of which they have acquired personal knowledge in the course of their work relating to the business of their own or any other department. (Thus, this writer had to get such permission for two books written while he was still serving.) In addition, persons who have charge of official documents are obliged to take precautions to ensure that the arrangements for their handling are such that there is no risk of unauthorized disclosure.

Official information is defined as any official code word or password, and any sketch, plan, model, article, note, document which is secret or confidential or is expressed to be either and which is or has been in the possession, custody or control of a holder of a public office. A certificate given by a minister that any of the foregoing items is secret or confidential is conclusive evidence of the fact so certified.

In principle it is, of course, necessary to have some such act. And yet what is the situation in practice? Going back, one finds that unauthorized disclosure led to the arms trial, to the award of damages to two journalists whose telephones were tapped and to the Beef Tribunal; in regard to the latter it was obvious that some of the deputies who raised issues about the meat trade had sight of official documents. In between, there were several other cases. Such disclosures arise for a variety of reasons; reward, perversity, party political or because of a view that a well-informed opposition improves the quality of government. There may also be some civil servants who if they perceived what they felt was inappropriate behaviour in their department would consider it to be in the public interest to reveal it. Can this be acceptable? What do civil servants do who are convinced that the decision taken by a minister in a particular case is unethical or

that their minister is otherwise engaged in unethical practices? Do they remain silent or do they pass on the information? These are not easy questions to answer. Note what happened in the British courts in the Ponting case where the judge went one way and the jury the other.

In addition to the controls under the Official Secrets Act there are what might be called constraints on civil servants being free with information. These derive from the role of the minister as set out in the Ministers and Secretaries Act, 1924. When the state was established in 1922 it was not unnatural to expect that the new ministers should wish to be in total charge of what was going on. They, therefore, adopted the Westminster model of government which was, and remains, centralist and essentially secretive in character. The view of the first ministers was that all of the activities of the state should be under the direct control of the elected representatives of the people, an entirely natural desire at the time, as already said. The situation was legalized in the Ministers and Secretaries Act, 1924 which is accepted as placing responsibility for all of the activities of a department on its minister. The minister is the department and no civil servant can, in law, give a decision. That is the reason why letters emanating from governments frequently commence with the phrase 'I am directed by the Minister for X to state'.

In this situation where ministers are held accountable to the Dáil and to the public for the actions of officials it is also entirely natural that the officials should proceed with their work with a great deal of care and a certain amount of caution. There are many ways in which civil servants may bring themselves to the notice of the minister, but taking any action, including being free with information which is likely to embarrass him/her, cause controversy or cause him/her to be questioned in the Dáil, is not the most desirable way. So, in addition to their natural conservatism, a natural trait of the Irish, the culture is one in which there is a reluctance to take chances or to speak out. Civil servants generally are happy enough with this situation. And so, freedom of information is not an issue that bothers them greatly. Rarely if ever is it discussed in corridors or canteens. The campaign to 'Let in the Light' is not one which really interests them. The average official does not see any advantage in having their activities paraded in public, and questions about the public interest or the common good, in this particular context, rarely cross their minds.

Some of the questions that this writer has heard raised relate to the nature and manner in which civil servants tender advice to ministers. As everyone knows that advice is tendered freely, frankly and independently, mainly in writing but, on occasion, supplemented orally. Some ask what effect would freedom of information legislation have on the giving of that advice if who said what and why were to be made public. Some would, of course, know that the situation differs elsewhere, for example, in Sweden. (How the freedom of information laws apply in Sweden is not for discussion here. Suffice it to say that the culture of openness is long embedded in the Swedish system, that official activities are closely governed by law, that clientelism has not reached the heights or depths that it has in Ireland, that they go to great lengths to achieve consensus etc.).

Freedom of information is, however, a subject on which the Association of Higher Civil Servants has a firm view. It supports a freedom of information culture. The association represents the key managerial grades in the civil service who are intimately involved in the formation of policy. It has published a policy document on the subject and has called for the introduction of a Freedom of Information Act. It, therefore, welcomes the commitment in this regard in the policy agreement made between the parties in *A Government of Renewal* (1995-1997):

There is a clear need for greater openness and accountability in Irish life, to allow better public access to information in the possession of State Departments and Agencies, both about themselves and the workings of the Government and Administration. We are, therefore,

committed to the enactment of Freedom of Information legislation, to cover both central government and the broad public sector, in 1995, modelled on the best practice in other countries.

The association draws attention, however, to the present situation in regard to civil servants appearing before Oireachtas committees who may find themselves in the midst of controversy with no rights under the Official Secrets Act and no opportunity to vindicate their professional character and reputation, possibly against elected representatives who may criticize them unfairly under the protection of parliamentary privilege.

The policy document published by the Association proposes radical changes to make decision-making more open and accountable. It goes further and calls for the publication by each department of a strategy statement which would give basic details of what a department proposed to do over a period of for example, five years, which would be openly debated in the Dáil. It also suggests that instead of the conventional estimates each department should prepare an annual report and accounts in a modern format and submit these for public consideration by the Dáil in the light of the earlier strategy statements. These proposals, would represent a practical framework for making government decision-making more open and accountable. So far, the Association's pleas for more openness have met with little apparent response and it awaits with interest, as we all do, publication of the government's proposals.

The Irish civil service has not been very good at change. One has but to recall the changes suggested in the Devlin Report, the promised reforms in the 1985 White Paper *Serving the Country Better* or such issues as the abolition of what is known as the dual structure¹, the introduction of merit pay or the adoption of comprehensive career development programmes, to mention just a few. But, the civil service cannot launch into reform programmes on its own. As pointed out above, civil servants are subservient to ministers and ministers are not noted for their interest in change and certainly not in the area of freedom of information, if one is to judge by the evidence to date. Indeed a feature of our political system is the lack of interest of politicians in issues such as organization and management of the public service. When in opposition they promise many changes, including more freedom with information. When they come to office, however, politicians are remarkably slow to change a system which, overall, they see as being to their advantage because of its secrecy, the power it confers on them and clientelism. This is obvious in their tardiness in making changes in the area where one would think changes would be of most benefit to their own activities, i.e. in the Dáil.

In adopting the Westminster system of government, where Parliament is supreme and secrecy is considered very important to its working, we seem to have gone further, in that it appears to be incumbent on ministers to seek to be the repositories of all knowledge and to filter out that knowledge as they see fit. Some of the ways in which this manifests itself are in the drawing up of proposals for legislation or for new schemes. In the past year alone there have been a number of examples of this. The reasons for the designation of certain areas for urban renewal have not been explained; nor have the reasons for the new TV station in the Gaeltacht, nor the precise circumstances in which foreigners are granted Irish passports. There are countless other examples and there are a number of unpublished reports of commissions and working parties.

Would the release of more information, for example, in regard to proposals which a minister has for new legislation improve the adversarial atmosphere in which much legislation is debated in the Dáil? And if the replies to parliamentary questions were framed in such a way as to give the maximum information to deputies and so be as helpful as possible, would that also help to improve the atmosphere? It is, of course recognized by ministers and civil servants that many of the questions asked are both actual and potential banana skins designed to embarrass the minister. All are treated accordingly; many replies are framed as damage limitation exercises. The practice of

1. Administrative and technical people having separate hierarchies instead of having a single structure as obtains in many other national organizations and in international organizations).

giving the very minimum of information to questions is enshrined in our system. Replies, if not economical with the truth are economical with information. The rules for civil servants in preparing replies for their ministers have (up to the time of writing) obliged them to answer only the specific question asked, to keep the reply as brief as possible, consistent with civility to the enquiring deputy and, above all, not to be discursive. My former colleague, Donal Russell, set out the position in reply to Mr Justice Hamilton at the Beef Tribunal 'Well, there is no rule of thumb on this as such, but one has to look at a question that's asked and give the information in direct answer to that question but not to offer information'. The situation was, perhaps more bluntly put by a former minister in the course of his evidence 'If the other side does not ask the right question they do not get the right answer and it's not for me to lead them where they figure they want to go'. It would not make much difference for civil servants if they had to provide more comprehensive replies than is the practice since they have to get out all the information anyway for inclusion in the minister's back-up note to enable him/her deal with supplementaries.

As mentioned earlier, civil servants, in our system, collect, analyse and synthesize information which they then submit to ministers with their recommendations for action. This is then discussed freely with the minister and views are expressed on the merits of the courses recommended. If all of this written material and notes of discussions were to be made publicly available, some civil servants would argue that it would cause them to be more circumspect and less frank in putting forward their views since they would then be forced into the public arena and into public controversy in a situation in which they could not reply. One change that would then certainly have to take place is that ministers' decisions would have to be clearly set out on the file; that notings by officials such as 'discussed with minister' or 'minister agrees generally' would no longer suffice and that ministers would have to set out specifically what they want done. Decision-making would require more recording. This, certainly, would be a change in practice since ministers are extraordinarily reluctant to write on files. Of course, if the system of political neutrality were to be modified – and perhaps we are seeing the beginning of this with the appointment of programme managers and advisers – there would be no difficulty for senior civil servants if their views were made public. In France and Germany, for example, civil servants are closely allied politically with their ministers.

Another aspect of freedom of information, or perhaps dissemination of information to be more apt, is that of participation in discussions on radio or television to explain and give information on the application of schemes and projects once they have been approved by ministers or the government. Frequently civil servants are the experts on these matters, having been engaged in drawing them up, each in their own area. Yet one could count on the fingers of one hand the number of times in the last year that civil servants have been so heard. Queries to government departments from journalists and others wishing to get information are usually referred to the department's information officer who because of his or her very close contact with the minister is regarded as the appropriate person to answer. Because of the culture, civil servants are reluctant to talk to the media about their work; sometimes they are reluctant to give information on the most straightforward matters.

To conclude, one thing is reasonably clear: in our system the whole issue of freedom of information is one that needs a great deal of consideration. This is, no doubt, the reason proposals on the matter have not yet been put forward, proposals which were promised also by the last government.